BLACK BOB INDIAN LANDS.

SUPPLEMENT
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JOHN SPEER, Editor.

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In the House of Representatives, on the 6th inst., Mr. Van Horn, on leave, made the following report, which was ordered to be printed and recommitted to the Committee on Indian Affairs:

Mr. Van Horn, from the Committee on Indian Affairs, to whom was referred the joint resolution (H. R. 181) "for the sale of the Black Bob Indian lands in Kansas to actual settlers only," reports the following, and asks that it be printed and recommitted:

By the first article of the Shawnee treaty of May 10, 1854, the Shawnee tribe of Indians ceded and conveyed to the United States a certain tract of land, designated and set apart for them in fulfillment of the second and third articles of the treaty of 1825, and conveyed to them by a patent bearing date the 11th day of May, 1844. By the second article, as amended by the Senate, the United States retroceded 200,000 acres of said tract, to be selected between the Missouri State line and a line parallel to and west of the same, thirty miles distant. The article provides, among other things, that each Shawnee residing east of said parallel line shall be entitled to 200 acres; and if the head of a family, a quantity equal to 200 acres for each member of his or her family, to include, in every case, the improvements on which such person or family resides. When two or more families occupy the same improvement, or occupy different improvements, in such close proximity that all of such persons or families cannot have the quantity of land to include their respective improvements which they are entitled to, and if they should be unable to make an amicable arrangement among themselves, the oldest occupant or settler shall have the right to locate his tract so as to include said improvements, and the others must make a selection elsewhere, adjoining some Shawnee settlement; and in every such case the person or family retaining the improvement shall pay those leaving it for the interest of the latter therein, the value of the same to be fixed, when the parties cannot agree thereupon, in such mode as may be prescribed by the "Shawnee council," with the consent of the United States agent for that tribe. This privilege of selecting lands was extended to every head of a family.

In what is known as "Black Bob" settlement it was agreed that there were a number of Shawnees who desired to hold their lands in common, and that they should do so, and have the land assigned to them in a compact body, equal to 200 acres to every Indian in each of said communities. And by the fourth article of the treaty those of the Shawnees who elected to live in common were thereafter to be permitted to make separate selections within the bounds of the tract which may have been assigned to them in common, and such elections shall be in all respects in conformity with the rule provided to govern those who shall in the first instance make separate selections. The members of the "Black Bob" band were, when they desired it, authorized to make selections. In 1866 sixty-nine, and subsequently sixty-five of them, did make selections, and the fact was duly certified by the chiefs and interpreter The list of the persons and lands was transmitted by the United States Indian agent, and in May, 1867, and in October, 1869, patents were issued

The retrocession to the tribe, and the provision that each Shawnee should be entitled to a specific tract, to be selected by him, vested in him an absolute and complete title in fee to such tract.

The effect of the treaty and the exercise of the right of selection under it secured much more than a possessory right to the selected tract. If the Shawnees had held by the original Indian title, and here ceded to the United States their lands, reserving therefrom certain tracts, they would have held merely the right to use and occupy such tract subject to the ultimate title of the Government, and its exclusive power to acquire that right. But here the Shawnees had the title of the United States. They became joint owners, with a further stipulation binding upon them and the United States, securing to each Indian two hundred acres, when selected, as provided by that stipulation; the tract was converted into individual property, and the title thereto vested as effectually as if a patent had issued therefor conformable to an express provision of law. In the case of the United States vs. Brooks (10th Howard, 442), the Supreme Court decided that a supplemental article of a treaty of a cession of land with a tribe of Indians, reciting that a certain quantity of land had been granted by the tribe to certain persons, and stipulating that those persons should have their right to said land reserved for them and their heirs and assigns forever, to be laid off on the southeast corner of the land ceded, gave to the persons named a fee simple, and their grantee had a perfect title. A grant like that in this treaty passes to the grantee all the estate which the United States had in the subject matter. This point is, in the language of Attorney General Black, firmly settled, if the highest judicial authority can settle anything (9 Opinions Attorneys General, p. 42). The earliest case on the subject in the United States courts is Rutherford vs. Green (2 Wheaton, 196). It has been followed by United States vs. Percheman (7 Peters, 51); Mitchell vs. United States (9 Peters, 711); Ludige vs. Roland (2 Howard, 581); Lessieur vs. Price (12 Howard, 59). Attorney General Bates (11 Opinions Attorneys General, p. 49), remarks:

> A grant of public land by statute is the highest and strongest form of title known to our law. It is stronger than a patent, for a patent may be annulled by the judiciary upon a proper case shown of fraud, accident, or mistake, while even Congress cannot repeal a statutory grant. A grant by Congress is higher evidence of title than a patent. (Ergimon vs. Astor, 2 Howard, 318.) A treaty is to be regarded as an act of Congress whenever it operates without the aid of any legislative provision. (Foster vs. Neilson, 2 Peters, 314.)

If, therefore, no provision had been made in the Shawnee treaty for a patent, inasmuch as each Indian who selected a tract had the full and absolute ownership thereof, he would be entitled, according to the opinion of the Attorney General (10 Opinions Attorneys General, 507), to a patent therefor under the act of December 22, 1854. A patent in such cases does not vest the title. It is only evidence of the preexisting title of the patentee. As before remarked, those of the Shawnees who might elect to live in common (and that did embrace those upon the Black Bob and Long Tail settlements), were thereafter permitted, if they desired it, to make separate selections, to be in all respects made in conformity with the rules provided to govern those who, in the first instance, made separate selections. The whole question as to right and title of those to whom patents should issue for the selected tracts was under discussion by the Supreme Court of Kansas, and the question involved in the case ultimately came before the Supreme Court of the United States (5 Wallace, p. 737). The local authorities declared that such lands were liable to taxation. The act for the admission of the State of Kansas (12 Statutes, p. 127) provided that nothing contained in the constitution of the State respecting its boundaries "should be construed to impair the rights of person or property now pertaining to Indians of said Territory, so long as such rights should remain unextinguished by treaty with such Indians; and also that no territory should be included, which by treaty with such Indian tribes was not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any State or Territory, but that all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas until the said tribe shall signify their assent to the President of the United States, to be included in said State." No treaty has been made by the Shawnees giving such consent, nor was it ever signified to the President of the United States. The Supreme Court of Kansas, among other things, remarks

> When the Indian, in pursuance of the treaty, made his selection of the lands to be held by himself in severalty, the title of the tribe, so far as the lands selected were concerned, vested in him; must not the conclusion be that the object of these patents was to convey to the Indians the ultimate title? It seemed to the court, and the correctness of this conclusion is confirmed by the fact that when any of these lands were sold by the grantees, with the consent of the Government, the whole consideration of the sale goes to the Indians The conclusion of the court upon the first point is that the absolute title to the lands in question was intended to be, and is, in the Indians, and not in the Government, and that they must be held to be taxable if there be no other reasons for adjudging them exempt. Second, are these lands exempt from taxation on the ground that they belong to the Shawnees?

The court says:

> That the Shawnees who own and occupy these selected and patented lands are precisely in the same situation they would have been in if, instead of giving them 200 acres of land apiece, the Government had given each $200, which they had used in purchasing each a quarter-section of the public lands wherever it could be found within the State

The court finally decided upon the whole case "that the Shawnees who held their lands in severalty under patents from the Government have the abstract title thereto; that the lands are subject to taxation unless specifically exempted by the constitution of this State, or by some paramount law; and that they are not so exempted." The treaty and the act of Congress referred to in the report of the honorable Committee on Indian Affairs of the Senate were before the Supreme Court of Kansas. They were also considered by the Supreme Court of the United States, in whose opinion the following comments will be found (*Ib*, p 753):

> The Indians who held separate estates were to have patents issued to them, with such guards and restrictions as Congress shall deem advisable for their protection Congress afterward (11 Stat at Large, p. 430) provided that the lands should be patented subject to such restrictions as the Secretary of the Interior may impose, and these lands are now held by these Indians under patent, without power of alienation except by consent of the Secretary of the Interior.

The Supreme Court reversed the decision of the Supreme Court of Kansas, but both tribunals concurred in construing the treaty and the act of Congress touching selections and the issue of patents.

Under this state of fact and law, to say nothing of the policy involved in the joint resolution, it is submitted that even an act of Congress could not divest the title already vested.

The committee therefore report that it is inexpedient to pass said joint resolution, and ask to be discharged from its further consideration.

VIEWS OF THE MINORITY.

Mr. Clarke, of Kansas, submitted the following as the views of the minority:

The undersigned, a minority of the Committee on Indian Affairs, dissenting from the views presented by a majority of said committee, submits the following:

Before referring to the legal aspect of the case, and to aid in a correct understanding of its merits, it is necessary to relate briefly the history of the Black Bob lands, so called.

The tract is situated in the eastern portion of Johnson county, Kansas, and comprises a little more than 33,000 acres. It is understood that every quarter-section is, and for a long time has been, occupied by settlers. Most of these people entered upon these lands soon after the close of the late war. At that time they were not occupied by the Indians, and, so far as the information before the committee shows, there was no opposition made to the entry and occupancy of the settlers by either the Government or the Indians. The intention of all the Shawnees to remove as speedily as possible to the Indian Territory south of Kansas, was known to all. The Indians were constantly imploring the Government to enable them to take steps to accomplish this purpose and settle their affairs in Kansas. To this end a treaty was made and sent to the Senate for its action. The wishes of the Indians, and the desire of those who had settled upon the land to obtain valid titles, was a matter of common information. But the treaty was buried in the Committee on Indian Affairs of the Senate for several years, and the claim persistently asserted that this whole matter was within the exclusive province of the treaty-making power, and that the constitution did not admit of any other method of relief. In pursuance of this claim the Cherokee neutral lands were sold in a body, against the protests of twenty thousand settlers interested therein, and abundant time was found to attempt to convey by treaty to a single corporation 8,000,000 acres of Osage Indian lands in shameful disregard of the rights of the settlers, of the welfare of the State of Kansas, of the homestead and pre-emption laws, and of sound principle of public policy. It was not until the corrupt treaty system fell in disrepute before the country, and with the present Administration, and was repudiated by the action of the House of Representatives, that departure was made from this preposterous claim, or any disposition manifested to obtain relief by a *law of Congress*, for the settlers on the Black Bob lands.

It is to be hoped, in the interest of justice and of the people, that the abandonment, even at this late day, of the wicked policy which consigned the settlers on the Cherokee neutral lands to such gross injustice, and from which the Osage settlers barely escaped, is something more than a mere pretense, and that it will result in some measure of practical utility

The Indian, Black Bob, was, at the time of the execution of the Shawnee treaty of 1854, a leading man among the Missouri Shawnees, and having a considerable band who acted with him, refusing to accept and hold lands in severalty, like other Shawnees, who availed themselves of the privilege extended by the treaty and selected lands which were thereafter patented to them, there was set apart to his party, in compact form, a tract equal to two hundred acres each, and amounting, as above stated, to more than 33,000 acres

These are the lands in controversy; and the material question to be considered is, are there any reasons, legal or equitable, why they should not be sold to the worthy settlers who occupy them, and who have been praying relief now more than two years?

To this it is answered that a large portion of the lands have been selected to be held in severalty, and a large number of selections have been approved and patented to members of the Black Bob band by the Secretary of the Interior. It is a matter of fact that June 10, 1867, certain patents were issued from the Interior Department to members of this band of the Shawnees, and covering in each case portions of this reservation designated as Black Bob settlement in the Shawnee treaty of May 10, 1854. It appears also that other selections were subsequently made by others of this band. The joint resolution before the committee is contested by parties who hold deeds under these patents

The undersigned holds that the patents are void, having been issued without authority. It does not seem necessary to discuss here the validity of patents issued solely by virtue of treaty covenants unsupported by act of Congress, for in this case the treaty (May 10, 1854) expressly required the action of Congress to provide for the issuing of patents. Article 9 declares:

> That Congress may hereafter provide for the issuing to such of the Shawnees as may make separate selections, patents for the same, with such guards and restrictions as may seem advisable for their protection therein.

Patents could not issue until authorized by Congress. It is claimed that an act of Congress of March 3, 1859, conferred this authority by the following language:

> That in all cases where, by the terms of any Indian treaty in Kansas Territory, said Indians are entitled to separate selections of lands, and to a patent therefor, under guards, restrictions, or conditions for their benefit, the Secretary of the Interior is hereby authorized to cause patents therefor to issue to such Indian or Indians, and their heirs, upon such conditions and limitations, and under such guards or restrictions as may be prescribed by said Secretary.

At this point, it is essential to revert to the covenants of the treaty (May 10, 1854), which will be found to place the members of Black Bob's band in a situation different from that of the tribe proper.

Section two entitles the Shawnees generally to 200 acres each, while of Black Bob's band, it is declared they "shall hereafter be permitted, if they so desire, to make separate selections." To obtain rights, such as are claimed for them under the act of March 3, 1859, Black Bob's band must have been entitled to "separate selections," at the time of its passage and taking effect. But this was not their condition; for they had not been "permitted," nor had they applied for permission under the treaty to make such selections. The act of Congress clearly referred only to such Indians as had acquired authority to make separate selections, and whose rights to patents were beyond doubt or question. The words "shall hereafter be permitted, if they so desire," distinguished the Black Bob band from the Shawnees, who were, by stipulation of the same treaty, "entitled to 200 acres," upon the treaty taking effect. Differing with the Black Bob band, they had, at the time of the action of Congress, already generally made selections which were approved; and the act authorizes the issue of patents for them. Theirs was a perfected right to patents. Not so with the Black Bob band, who had made no selections, and held no claim or right to patents The words "are entitled," used in the act of Congress cited, constitute the test of this question They clearly were not then entitled to a selection, had made no selections; and while the treaty provided that they might "hereafter be permitted to make separate selections, if they so desire," it by no means lifted them to the level of other Shawnees, who enjoyed, by the terms of the same treaty, a completed, perfect right to selections, and by the terms of the act of Congress were authorised to have patents issued to them.

Under the operation of the treaty of 1854, the undersigned cannot conclude that members of Black Bob's band were entitled to receive patents for land on separate applications therefor by individuals of the band. They elected to live and hold lands in common. By the fourth article of the treaty, under which these pretended selections were sought to be justified, no fragment or part of the band became entitled to "hereafter be permitted to make separate selections." It was the whole Black Bob band referred to in the words of the treaty as "those of the Shawnees who may elect to live in common." There was palpable injustice in recognizing the claims of these patentees and their assigns, by reason of the injury done to the remaining portion of the band If a few of these Indians had the right to select lands and to procure patents, then the common occupancy is surrendered. It certainly was not just to permit a few shrewd Indians to seize all the more valuable lands of the tract, and leave a comparatively worthless residue to the others. Such action certainly was not contemplated by the treaty, and no rights in severalty accrued to that portion of the band to whom these patents were issued. It is unnecessary to argue the proposition that the patent of itself creates no title. Those issued in this case are void, having been issued without authority and in violation of law.

It is proper, in this connection, to state that the Supreme Court of the State of Kansas has never passed upon the question of the validity of these selections. The case referred to by the report of the majority of the committee arose in Johnson county, Kansas, upon the attempt of the county authorities to tax the lands of certain Shawnees, allotted them in severalty by the treaty of 1854. They were the selections of the tribe proper, provided for absolutely, to which reference has herein been made. The Black Bob band elected to hold in common; and the consent of the band to a dissolution of this relation was a condition precedent to any division or separation of the common property. The opinion of that court, cited in the majority report, did not have, and was not intended to have, the least relation to the Black Bob lands. The opinion of the Supreme Court of the United States, also cited in the majority report, and reversing the decision of the Kansas tribunal, related to the head rights of the Shawnees, created by the treaty, recognized by the department, and patented without opposition. When these cases arose there was no conflict about the Black Bob common lands, and the decision does not have the slightest bearing on this question.

Shall, then, the Congress set aside these pretended conveyances, and in settlement of the rights of both Indian and settler, provide for the sale of the tract in small parcels to the actual settlers thereon? By the terms of this treaty (May 10, 1854), there can be no question as to the power of Congress to remedy by legislation the difficulties of this case. Article 12 declares

> If, from causes not now foreseen, this instrument should prove insufficient for the advancement and protection of the welfare and interest of the Shawnees, Congress may hereafter, by law, make such further provision, not inconsistent herewith, as experience may prove to be necessary to promote the interests, peace and happiness of the Shawnee people

Article 2 declares:

> And the said Indians hereby cede, relinquish and convey to the United States all tracts or parcels of land which may be sold, or are required to be sold, in pursuance of any article of this instrument.

Here, then, are ample grounds for the action recommended. Allusion has already been made to the fact that there was pending for years in the Senate a treaty with the Shawnees, in which the disposal of all their lands (including the Black Bob tract), and their removal to the Indian Territory was contemplated. It is well understood also, that no objections were made by the Black Bob Indians, or by the Department of the Interior, to the disposal of these lands to actual settlers, who desired to purchase their homes at a fair price Indeed, constant appeals were made by the settlers to the Committee on Indian Affairs of the Senate to amend the treaty so that the land might be sold to them to the exclusion of any and all schemes of speculation. Why the appeals of these hardy pioneers were for so long a time persistently disregarded, does not satisfactorily appear. That treaty, after this long period of indifference both to the rights of the settlers and the Indians, was finally withdrawn from the Senate, and it is now probable that no other will be negotiated. There is but one door open, then, to settler and Indian. It is the door of Congress Articles 12 and 2 of the treaty cited so often in this report confer ample powers for the action requested on behalf of the settlers. The promotion of "the interests, peace and happiness," and "the advancement or the protection of the welfare and interests of the Shawnees," demand a speedy settlement of this long contested case. The sale to the settler at $2.50 per acre will reasonable recompense the Indian for his long abandoned reservation, and give to the settler that peace and security which he so long invoked in vain from the corrupt treaty system, and now seeks by law of Congress. In pursuance of this policy, on behalf of the Shawnees, which "experience proves to be necessary," the Congress finds no obstacle, if, as regarded by the undersigned, said patents were illegally issued

The undersigned therefore recommends the passage of the joint resolution hereto appended.

SIDNEY CLARKE.

JOINT RESOLUTION for the sale of the Black Bob Indian lands in Kansas to actual settlers only.

Whereas a large tract of land in Kansas set apart, in a compact body to be held in common, by a treaty with the Shawnee tribe of Indians, dated May 10, A. D. 1854, and proclaimed November 2, of the same year, for the benefit of certain Indians of Black Bob's settlement, is now, and for many years past has been, occupied by a large number of actual settlers, and whereas the said Indians are desirous of disposing of their lands in Kansas and removing to the Indian Territory. Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled That each bona fide settler now occupying said lands, and having made improvements thereon, or the heirs-at-law of such, who is a citizen of the United States, or who has declared his intention to become such, shall be entitled to purchase the lands so occupied and improved, not to exceed one hundred and sixty acres in each case, at the price of $2 50 per acre, under the same rules and regulations, as regards proof of settlement, required by the act of September 4, 1841, granting pre-emption rights to settlers on the public lands And the proceeds of the sales of said lands shall be expended for the purpose of securing lands in severalty for said Indians in the Indian Territory, and otherwise for their benefit, in such manner as the President may direct. Any sale or conveyance of said lands, except as provided in this resolution, are hereby declared to be null and void. *Provided, however,* That all of said lands shall be sold, to actual settlers only, within the period of one year, under the direction of the Secretary of the Interior